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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARCEL HENRY BALLIER, Defendant and Appellant.	E061444 (Super.Ct.No. SWF1208110) OPINION

APPEAL from the Superior Court of Riverside County. Michael J. Rushton, Judge. Affirmed.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Peter Quon, Jr., and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant, Marcel Henry Ballier, of sexually penetrating a child 10 years of age or younger. (Pen. Code, § 288.7, subd. (b), count 1.)[1] The jury acquitted defendant on four counts of committing a lewd act upon a child under the age of 14 (§ 288, subd. (a), counts 2-5), but convicted him of four counts of the lesser included misdemeanor offense of simple battery (§ 242). The trial court sentenced defendant to serve 15 years to life in state prison on the felony conviction and 180 days on each misdemeanor conviction to be served concurrently with each other and with the sentence on count 1.

On appeal, defendant raises three claims of instructional error related to count 1. First, he contends the trial court erred by failing to instruct the jury sua sponte with sexual penetration of a person under the age of 18 (§ 289, subd. (h)) as a lesser included offense to sexual penetration of a child 10 years of age or younger (§ 288.7, subd. (b)). Second, he contends the trial court erroneously instructed the jury that the People did not need to establish the offense occurred within the exact time period alleged (CALCRIM No. 207) without sua sponte specifying in the same instruction that the jury was required to find the act of penetration occurred before the victim's 11th birthday. Defendant also contends that if we conclude he forfeited the right to appeal the trial court's CALCRIM No. 207 instruction, his trial attorney's failure to object at trial constituted ineffective assistance of counsel. Third, defendant contends the trial court gave an erroneous

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[1] All further unlabeled statutory references are to the Penal Code.

unanimity instruction (CALCRIM No. 3502) that allowed the jury to convict him on count 1 without all 12 jurors agreeing which incident constituted the offense.

For the reasons explained *post*, we affirm the judgment.

I

FACTUAL BACKGROUND

Jane Doe was born on April 2001 and was between nine and 11 years old during the events that formed the basis of the charges against defendant. She and her younger brother and sister resided with their grandparents in Perris, California. Defendant was a close and old friend of Doe's grandparents and frequently visited the house where Doe lived. Defendant sometimes picked up Doe and her brother from the bus stop.

In October 2012, when she was 11 years of age, Doe told her older sister, Sherry Ann, that defendant had been touching her inappropriately. Sherry Ann told their grandmother, who took Doe to a hospital. The Riverside Child Assessment Team (RCAT) interviewed Doe about defendant's conduct. The RCAT interview was recorded and the prosecution played it for the jury. Though Doe also testified at trial, she did not testify in detail about her abuse, but instead testified that she told the RCAT interviewer the truth about what had happened.

At the RCAT interview, Doe reported that defendant touched her inappropriately on five occasions. She said she was about nine years of age at the time of the first incident. Defendant was at her house with his two young granddaughters. Doe was watching a cartoon while sitting on a large couch. Defendant sat next to Doe and put his hand down her pants, inside her underwear. According to Doe, defendant rubbed her

vagina "right above the clitoris" with his index and middle fingers in a circular motion while humming. She said this touching lasted for a few minutes, whereupon he stopped, got up, and walked away.

The second incident occurred in defendant's truck after he picked up Doe and her younger brother from the bus stop. Doe reported that defendant put his hand under her skirt and inside her underwear. He again touched her vagina with his hand and moved it in a circular motion while humming. She said that this time he only "barely got [his hand] like that far down" and "he touched the vagina but it wasn't far enough to go very far." On this occasion, Doe reported she was 10 or 11 years of age, probably 10.

The third incident also occurred in the truck when Doe's brother was present. Defendant rubbed Doe's vaginal area outside her pants while humming. The trip lasted about three minutes and defendant stopped when they arrived at Doe's house. Jane reported that both incidents in defendant's truck occurred while she was in the fifth grade.

The fourth and fifth incidents occurred on the same weekend day in July 2012, after Doe had turned 11. The first incident that day occurred in the morning. Doe was in her pajamas in her bedroom watching a television show. Defendant came into her room, put his hand down her pajama bottoms, and touched her vagina and clitoris with both "up and down and circular" motions, and hummed. Doe tried to move away from defendant, but she did not succeed in getting away. Defendant stopped touching her when he heard Doe's grandmother go outside. Around noon, defendant entered Doe's room again. She was sitting in a chair watching another television show. Defendant squatted down next to

her, put his hand into her pajama pants, and again moved his hand in a circular motion. Doe said he "touched the clitoris a little bit and then it didn't go farther than the clitoris."

Defendant admitted to touching Doe's vagina, though he said he did so on only one occasion. In an initial interview with Ryan Deanne, an investigator in the Sexual Assault and Child Abuse Unit of the Riverside County Sheriff's Department, defendant denied touching Doe inappropriately. However, in subsequent interviews on November 27, 2012, defendant told Ryan Angulo and then Investigator Deanne that he had touched Doe one time. Investigator Deanne testified that defendant told Angulo the incident occurred "sometime in July," and told Investigator Deanne it happened approximately "a year ago" when Doe was "maybe 8 or 10." Later, defendant stated again that the incident happened about a year ago. According to defendant, he and Doe were in her house near the fireplace. He said he touched her vagina, but only "for a quick second." He said he "ran [his] hand down her pants" and "just reached around and touched it and pulled [his] hand out." Defendant repeatedly said he had touched her only that one time. He said he thought Doe was 10 or 11 at the time of the interview. Investigator Deanne asked whether that meant she was nine or 10 at the time of the incident, and defendant responded "Right, right." The November 27, 2012 interview with Investigator Deanne was recorded and played for the jury.

The prosecution charged defendant with one count of criminal conduct for each of the events Doe reported. Count 1 charged defendant with sexually penetrating a child 10 years of age or younger. (§ 288.7, subd. (b), count 1.) The prosecution specified in the amended information that the section 288.7, subdivision (b) charge was based on conduct

that occurred on or about April 2010 to March 2012, which was before Doe turned 11. Counts 2 through 5 charged defendant with committing lewd acts upon a child under the age of 14. (§ 288, subd. (a).) The prosecution alleged those four incidents occurred on or about April 2010 to July 2012.

The trial court gave the jury instructions respecting the dates on which the alleged offenses occurred and Doe's age at the time of the alleged offenses, including CALCRIM No. 207 (Proof Need Not Show Actual Date), CALCRIM No. 1128 (Sexual Penetration with Child 10 Years of Age or Younger), and CALCRIM No. 3502 (Unanimity: When Prosecution Elects One Act Among Many). The court also instructed the jury as to the elements of simple battery (§ 242), a misdemeanor, as a lesser included offense to both the lewd touching and sexual penetration offenses, and attempted sexual penetration (§§ 664, 288.7, subd. (b)), as a lesser included offense to the sexual penetration offense. The trial court did not instruct the jury on any other lesser included offenses, and defendant did not request any additional lesser included offense instructions.

After receiving these instructions, the jury deliberated and convicted defendant of sexually penetrating Jane Doe when she was 10 years of age or younger in count 1. The jury acquitted defendant on all four counts of committing a lewd act upon Jane Doe, but convicted him of four counts of simple battery as to counts 2 through 5. Defendant appeals and asks us to reverse his conviction on count 1, but not his convictions on counts 2 through 5.

II

DISCUSSION

A. *The Trial Court did not err by Failing to Instruct the Jury that Section 289, Subdivision (h) is a Lesser Included Offense to Section 288.7, Subdivision (b)*

Defendant contends the trial court committed prejudicial error by failing to instruct the jury sua sponte on sexual penetration of a person under the age of 18 years (§ 289, subd. (h)) as a lesser included offense of sexual penetration of a child 10 years of age or younger (§ 288.7, subd. (b)). We disagree.

Section 288.7, subdivision (b) provides, in relevant part: "Any person 18 years of age or older who engages in . . . sexual penetration . . . with a child who is 10 years of age or younger is guilty of a felony and shall be punished by imprisonment in the state prison for a term of 15 years to life." The trial court instructed the jury with CALCRIM No. 1128, which directed, in pertinent part, that to establish defendant violated section 288.7, subdivision (b), "the People must prove that: [¶] 1. The defendant engaged in an act of sexual penetration with Jane Doe; [¶] 2. When the defendant did so, Jane Doe was 10 years of age or younger; [¶] 3. At the time of the act, the defendant was at least 18 years old." The instruction also directed the jury that "[u]nder the law, a person becomes one year older as soon as the first minute of his or her birthday has begun." According to defendant, the offense set out in section 289, subdivision (h) is a lesser included offense. That subdivision provides: "Except as provided in Section 288, any person who participates in an act of sexual penetration with another person who is under 18 years of

age shall be punished by imprisonment in the state prison or in the county jail for a period of not more than one year." (§ 289, subd. (h).)

"'We apply the independent or de novo standard of review to the failure by the trial court to instruct on an assertedly lesser included offense. [Citation.] A trial court must instruct the jury sua sponte on a lesser included offense only if there is substantial evidence, "'that is, evidence that a reasonable jury could find persuasive"' [citation], which, if accepted, "'would absolve [the] defendant from guilt of the greater offense' [citation] *but not the lesser*" [citation].' [Citation.] '[A] lesser offense is necessarily included in a greater offense if either the statutory elements of the greater offense, or the facts actually alleged in the accusatory pleading, include all the elements of the lesser offense, such that the greater cannot be committed without also committing the lesser. [Citations.]' [Citation.]" (*People v. Licas* (2007) 41 Cal.4th 362, 366.)

Assuming for the purpose of this argument only that section 289, subdivision (h) is a lesser included offense to section 288.7, subdivision (b), there was insufficient evidence to require the additional instruction. Defendant did not object to the omission of the instruction at trial. A trial court must instruct the jury sua sponte on a lesser included offense *only if* there is substantial evidence that could absolve defendant from guilt of the greater offense but not the lesser offense. "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 162, abrogated on other grounds by amendment of

§ 189.) Substantial evidence is "'"'evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed. [Citations.]" (*Ibid*.)

Violation of section 288.7, subdivision (b) requires proof that defendant engaged in sexual penetration with a child prior to her 11th birthday. (*People v. Cornett* (2012) 53 Cal.4th 1261, 1275 [holding "'10 years of age or younger' as used in section 288.7 to be another means of saying 'under 11 years of age'"].) We assume, for the purpose of this discussion only, that section 289, subdivision (h) proscribes participating in sexual penetration with a minor who has reached her 11th birthday. Defendant contends his statement, reported to the jury by Investigator Deanne, that he touched Doe inappropriately one time "sometime in July" constitutes substantial evidence that he committed the act of sexual penetration for which he was convicted in July 2012, after Doe had turned 11 years old. He argues that evidence would allow a reasonable jury to conclude he was guilty of violating section 289, subdivision (h), but not section 288.7, subdivision (b). We disagree.

Nearly all the evidence related to the timing of the offense alleged in count 1 supported the conclusion that defendant committed the act of sexual penetration when Doe was 10 years old or younger. The prosecution chose to base the count 1 charge entirely on what Doe described as the first incident of inappropriate touching. Doe said she was "like 9" years old at the time of the first incident. Doe also described two later incidents which she said occurred when she was "[p]robably 10." Most of defendant's statements that were shown to the jury are consistent with Doe's version of events.

Defendant told Investigator Deanne at a November 27, 2012 interview that he had touched Doe inappropriately approximately a year before the interview. At that time, Doe was 10 years old. At the beginning of the interview, without prompting from Investigator Deanne, defendant said, "You know, this happened damn near a year ago, I guess." When Investigator Deanne asked how old Doe was then, Defendant responded, "Oh I don't know. Probably, maybe 8 or 10? I don't know how old she is." Later in the interview, Investigator Deanne sought to confirm the timing. He asked, "[Y]ou said this happened about a year ago?" Defendant responded, "Yeah." He asked how old Doe was at the time of the interview, and defendant said, "I think 10 or 11, or something." Investigator Deanne responded, "10 or 11?" and asked "so this was when she was, uh, 9 or 10 or so?" Defendant responded, "Right, right."

To counter this evidence, defendant relies on one exchange from the testimony of Investigator Deanne. The prosecution asked Investigator Deanne about an interview defendant gave to Ryan Angulo on November 27, 2012, prior to defendant's interview with Investigator Deanne on the same day. Investigator Deanne observed the interview from outside the room. The prosecution asked Investigator Deanne whether "when [defendant] admitted that he had done the touching [he] indicate[d] that it was just once sometime in July?" Investigator Deanne responded, "Yes, he did." Defendant argues

that Investigator Deanne's testimony is sufficient to allow a jury to reasonably conclude that Doe was 11 years old when he committed the offense alleged in count 1.[2]

Setting aside defendant's one reference to July, the statements of both defendant and his victim are consistent that the offense of sexual penetration occurred when Doe was 10 years old or younger. Defendant's statement, reported by Investigator Deanne, that he had molested Doe once "sometime in July" is too vague to counter that evidence. Defendant did not say the incident occurred in July 2012. Given all of defendant's own statements that the incident occurred about a year prior to the November 27, 2012 interview as well as his statements that Doe was between eight and 10 at the time, the only reasonable inference is that he meant July 2011 when he said the incident happened in July. We hold that a reasonable jury could not find that statement persuasive evidence that the offense occurred after Doe turned 11 years old on April 2012. Accordingly, the

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[2] Defendant also relies on the transcript of the Angulo interview, which is included in the Clerk's Transcript. However, as the People note, the Angulo interview was pre-marked as an exhibit, but not introduced into evidence. The transcript shows defendant admitting for the first time that he touched Doe sexually. Angulo asked, "So it was just once[?]" Defendant responded, "Just that once. Sometime in July." As in his later interview with Investigator Deanne, however, defendant reported that the incident had occurred approximately a year earlier. Before he had admitted touching Doe inappropriately, defendant claimed to have difficulty remembering what had happened and explained, "This is awhile back. I really don't know." When Angulo later asked defendant what kind of pants Doe had on at the time, he responded, "I don't know. It was pants, or shorts. Or . . . it's been, oh, God, maybe a year ago or so." Angulo asked, "So you think it was approximately a year ago?" Defendant said, "Probably." Angulo asked, "Almost a year ago?" Defendant responded, "Yeah, maybe a year ago, mm-hm." We note these statements are consistent with the evidence in the record, but do not rely on them to reach our decision.

trial court did not have a sua sponte duty to instruct the jury on section 289, subdivision (h).

Defendant contends the context of his statement admitting he had touched Doe sexually "sometime in July" makes it reasonable for the jury to infer that he meant July 2012. He points out that the interview occurred in November 2012 and argues it would be reasonable for the jury to infer that defendant did not include the year because he was talking about July of the same year. There would be merit to defendant's argument if his statement placing the incident in July stood alone. It does not. Instead, defendant's statements to Investigator Deane, which were played for the jury, came in the midst of several other statements in which he claimed the incident had occurred approximately a year before the interview. In the context of those repeated statements, defendant's argument that he meant the offense occurred in July 2012 verges on speculation, which is not sufficient to require an instruction on a lesser included offense. (See *People v. Mendoza* (2000) 24 Cal.4th 130, 174.)

B. *The Trial Court did not err by Failing to Modify CALCRIM No. 207 to Specify the Offense had to Occur Before Doe's 11th Birthday*

Defendant contends the trial court committed prejudicial error by giving the jury "a modified version of CALCRIM No. 207 that did not require the jury to find that Count One [the sexual penetration offense] was committed prior to Jane Doe's 11th birthday."

CALCRIM No. 207 is a standard instruction that the prosecution need not prove a crime occurred on the precise date alleged. In this case, the prosecution alleged count 1 occurred within a specific date range. Accordingly, the trial court modified CALCRIM

No. 207 to incorporate the date range instead of a date certain. The revised instruction directed the jury: "It is alleged that the crime charged in count 1 occurred during the time period from April . . . 2010 to March 2012. . . . The People are not required to prove that the crime took place exactly on those dates but only that it happened reasonably close to those dates." According to defendant, this instruction allowed the jury to convict defendant of sexual penetration of a person 10 years or younger after Doe turned 11 on April 2012. This is so, he argues, because the jury could have found the event occurred after her birthday and concluded the instruction allowed it to convict on the basis that April 2012 was "reasonably close to" March 2012. Defendant argues that to forestall that misunderstanding, the trial court was required to clarify in CALCRIM No. 207 that the jury must find Doe was 10 years old or younger at the time of the offense to convict defendant of count 1. We disagree.

1. *Defendant forfeited his challenge to CALCRIM No. 207*

We conclude, as an initial matter, that defendant forfeited his claim of error by failing to object to the trial court's modified version of CALCRIM No. 207 or request any modification or clarification of it at trial. "A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal. [Citation.]" (*People v. Lee* (2011) 51 Cal.4th 620, 638.)

Here, the trial court modified the standard instruction, which states that the prosecution need not show the exact date of the offense "but only that it happened reasonably close to" the day alleged. Instead of inserting a date certain, the trial court inserted the range of dates within which the prosecution sought to show defendant had committed count 1. Defendant does not contend that the instruction was erroneous for including a date range instead of a specific date of the offense. Instead, he argues that because of the evidence that some instances of molestation occurred after Doe's 11th birthday, the trial court should have clarified for the jury that it could not convict defendant of count 1 if it found the offense occurred on or after April 2012, which is outside the date range. If defendant believed the instruction required such a clarification, he was obliged to request it in the trial court. (*People v. Lee*, *supra*, 51 Cal.4th at p. 638.)

2. *The trial court did not err by failing to clarify the instruction*

Even on the merits, we reject defendant's contention that the trial court was required to clarify in CALCRIM No. 207 that the jury must find Doe was 10 years old or younger.

"'If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction.' [Citations.] '"'"[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction."'"' [Citation.] The reviewing court also must consider the arguments of counsel in assessing the probable impact of the instruction on the jury. [Citations.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1202; see also *People v. Cross* (2008) 45

Cal.4th 58, 67-68 ["A defendant challenging an instruction as being subject to erroneous interpretation by the jury must demonstrate a reasonable likelihood that the jury understood the instruction in the way asserted by the defendant"].) "A trial court is not obliged to condense the required explanation of a legal rule or concept in a single instruction; a charge is not erroneous or prejudicial simply because a required explanation is given in two instructions rather than one." (*People v. Lewis* (2001) 25 Cal. 4th 610, 649.) "Jurors are presumed able to understand and correlate instructions and are further presumed to have followed the court's instructions. [Citation.]" (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.)

As we have discussed *ante*, the trial court directed the jury that it could convict defendant of sexually penetrating a child 10 years old or younger only if it found the offending act occurred while Doe was still 10 years old. Specifically, the court directed the jury that to find defendant guilty of "engaging in sexual penetration with a child 10 years of age or younger," it must find the prosecution showed: "1. The defendant engaged in an act of sexual penetration with Jane Doe; [and] [¶] 2. When the defendant did so, Jane Doe was 10 years of age or younger." The same instruction informed the jury that "a person becomes one year older as soon as the first minute of his or her birthday has begun." That instruction is sufficient to direct the jury that it could not convict defendant of count 1 without finding the incident occurred before Doe's 11th birthday on April 2012. Moreover, the prosecution was equally clear in closing arguments that defendant could be guilty of count 1 only if the offense occurred while Doe was 10 years of age or younger. In view of the trial court's plain instruction

regarding Doe's age and the prosecution's reinforcement, it is very unlikely that the jury suffered from the confusion defendant imputes to it.

It is immaterial that the court did not repeat the age requirement in delivering CALCRIM No. 207. We judge the correctness of the jury instructions as a whole, and the trial court plainly required the jury to find the offense occurred before Doe's 11th birthday in other instructions. Moreover, the trial court specifically directed the jurors to consider the instructions together. We presume that the jury followed the trial court's instructions, construed them together, and therefore did not understand the modified CALCRIM No. 207 to instruct that they could convict defendant of count 1 if they found the offense occurred after Doe's 11th birthday on April 2012. (See *People v. Sanchez*, *supra*, 26 Cal.4th at p. 852.)

Defendant contends the trial court violated its sua sponte duty to instruct the jury "on all requisite elements" of the offense and "to limit the jury in its consideration of the evidence to the pertinent time period." This argument fails because the trial court *did* instruct the jury on both points. The modified version of CALCRIM No. 207 instructed the jury that "the crime charged in count 1 occurred during the time period from April 2010 to March 2012." CALCRIM No. 1128 instructed the jury that the prosecution was required to prove that "[t]he defendant engaged in an act of sexual penetration with Jane Doe" when she "was 10 years of age or younger. . . ." We conclude the trial court

fulfilled its sua sponte duty to instruct the jury and did not err by failing to clarify those instructions as defendant requests on appeal.[3]

C. *Unanimity Instruction*

Defendant contends the trial court committed prejudicial error by refusing to include the optional bracketed sentence at the end of the standard CALCRIM No. 3502 unanimity instruction.

The entire standard instruction provides: "You must not find the defendant guilty of <*insert name of alleged offense*> [in Count __], unless you all agree that the People have proved specifically that the defendant committed that offense [on] <*insert date or other description of event relied on*>. [Evidence that the defendant may have committed the alleged offense (on another day/ [or] in another manner) is not sufficient for you to find (him/her) guilty of the offense charged.]" (CALCRIM No. 3502.)

Defendant argues "the jury could have concluded the offense in the living room described by Jane Doe and the offense appellant confessed to committing in the living room were actually two separate incidents" and convicted him on count 1 without all 12 jurors agreeing on which incident constituted the offense. According to defendant, including the bracketed sentence to specify that "[e]vidence that the defendant may have committed the alleged offense on another day is not sufficient for you to find him guilty

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[3] Defendant contends that if we find his objection to CALCRIM No. 207 forfeited, trial counsel's failure to object and seek clarification before the trial court constituted ineffective assistance of counsel. We need not address this contention because we have reviewed defendant's claim of error on the merits and determined there was no error.

of the offense charged" would have "clarified that [defendant] could only be convicted based on the act described by Jane Doe." Defendant preserved this issue on appeal by objecting at trial. We disagree that the additional direction was needed.

"[A]ssertions of instructional error are reviewed de novo." (*People v. Shaw* (2002) 97 Cal.App.4th 833, 838.) "In reviewing [a] purportedly erroneous instruction[ ], 'we inquire "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution.' [Citation.] In conducting this inquiry, we are mindful that '"a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 957.) "'Additionally, we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]" (*People v. Richardson* (2008) 43 Cal.4th 959, 1028.)

"A criminal defendant is entitled to a verdict in which all 12 jurors concur as a matter of due process under the state and federal Constitutions. [Citation.] In any case in which the evidence would permit jurors to find the defendant guilty of a crime based on two or more discrete acts, either the prosecutor must elect among the alternatives or the court must require the jury to agree on the same criminal act. [Citation.] . . . The omission of a unanimity instruction is reversible error if, without it, some jurors may have believed the defendant guilty based on one act, while others may have believed him guilty based on another." (*People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1588-1589 [Fourth Dist., Div. Two].)

The instruction in this case was adequate to protect defendant's constitutional right to a unanimous jury verdict because the prosecutor *did* elect among the alternative acts and the court *included* that election in CALCRIM No. 3502. The trial court gave the jury the following version of the instruction: "You must not find the defendant guilty of the crime charged in count 1, sexual penetration with a child 10 years of age or younger in violation of Penal Code section 288.7 [, subdivision] (b), . . . unless you all agree that the People have proved specifically that the defendant committed that offense described by Jane Doe as the first touching by the defendant in which she described the defendant touching her as she sat on the couch in the family room while the defendant's grandchildren were present."

The instruction, by its terms, permits the jury to convict on count 1 *only if* it found that the defendant sexually penetrated Doe on the specific occasion Doe described in significant detail. If some subset of the jurors concluded the incident Doe described did not establish defendant's guilt but also concluded defendant had admitted to a separate incident that did establish his guilt, the instruction directed the jury that it *could not* find defendant guilty of count 1. Thus, there was no need to include the bracketed language specifying the jury must agree on the date of the offense, because there was no reasonable likelihood that any juror following the instruction as written would conclude the incident Doe described did not establish guilt, yet conclude defendant was nonetheless guilty on the basis of a separate incident defendant admitted.

In addition, the bracketed final sentence defendant requested was not appropriate to the case. The guide notes preceding the CALCRIM instructions explain that "instructions use brackets to provide *optional* choices that may be necessary or appropriate, depending on the *individual circumstances of the case*. . . ." (Judicial Council of Cal., Crim. Jury Instns. (2015) Alternatives vs. Options, p. xxvi, italics added.) The bracketed options in CALCRIM No. 3502 correspond to options in the body of the main standard instruction relating to how the prosecution and the court choose to identify the offense. If the prosecution had elected to identify the offense as occurring on a specific date, the court would have instructed the jury that to convict, all its members must "agree that the People have proved specifically that the defendant committed that offense on [the date specified]." (CALCRIM No. 3502.) In such a case, if there was evidence jurors could have used to find defendant committed the same offense on a *different* date, a trial court would be advised to include the optional clarifying instruction defendant requests in this case. But that optional instruction was not appropriate here because the prosecution identified the offense in terms of Doe's detailed description. The trial court therefore modified the jury instruction, as the standard instruction provides, by inserting the "description of event relied on." (CALCRIM No. 3502.) In that context, including the optional instruction requiring unanimity regarding the specific date of the offense would have only caused confusion for the jury. We conclude the trial court was correct to refuse the requested instruction.

III

DISPOSITION

We affirm the judgment.

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RAMIREZ
P. J.

We concur:

KING
J.

MILLER
J.